IN THE

Supreme Court of the United States

October Term, 1944.

No. ——

FRANKLIN PEANUT COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The "Memorandum Findings of Fact and Opinion" of the Tax Court is unreported, but is found in the record at p. 247 et seq.

The opinion of the Circuit Court of Appeals for the Fourth Circuit appears in 144 F. (2d) 979, (R. 274 et seq).

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals here sought to be reviewed was entered August 26, 1944 (R. 281). The petition for rehearing was denied October 2, 1944 (R. 292). By appropriate order entered December 9, 1944 (R.

294) this Court extended to and including March 2, 1945 the time allowed for filing petition for writ of certiorari.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (ch. 229 43 Stat. 936).

III.

STATEMENT OF THE CASE.

A summary statement of the facts is given in the petition, supra p. 2, 3.

IV.

STATUTE INVOLVED.

REVENUE ACT OF 1936:

"SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be——

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly * * * in any manner whatsoever.

"SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin

during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

* * * * * * * * * *

(c) The 'tax period' shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The 'period before and after the tax' shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

* * * * * * * * * *

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to——

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include

any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;"

V.

SPECIFICATION OF ERRORS.

It is submitted that the Court below erred:

1. In affirming the decision of the Tax Court, thereby denying to petitioner recovery of an unconstitutional tax theretofore paid.

2. By indulging in the presumption that the Tax Court had considered certain evidence with respect to which there is an utter absence of Findings.

3. By approving the failure of the Tax Court to make adequate Findings with respect to all testimony and other evidence adduced at the trial of the case.

4. By basing its conclusion largely upon the inoperative statutory marginal presumption, without any indication that the controversy had been decided by weighing *all* the evidence rather than by relying principally on margin computations.

VI.

SUMMARY OF ARGUMENT.

A.

In deciding the controversy herein, the lower courts have ignored the economic theories underlying the alleged shifting of the tax burden. Evidence of the economic burden is the only evidence upon which the taxpayer could possibly hope to win the case, since petitioner admitted the adverse margin and then proceeded to rebut by introducing expert and other direct evidence.

B.

When the presumption, based on margin computations became inoperative as it did, there was left in the case no evidence sufficiently substantial to support the ultimate finding that petitioner shifted the entire tax burden.

C.

The case of *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, does not preclude an adequate review of the decision below in this case since the underlying factors in the two cases are entirely different.

VII.

ARGUMENT.

A.

Petitioner feels very strongly that it has not had its day in Court. So much has been omitted from the Findings below as to convince one that the Tax Court did not consider the only evidence upon which petitioner could hope to prevail in this litigation. Said Findings were inadequate for a full and complete review on appeal.

The foregoing omission of adequate Findings can doubtless be attributed to the fact that the entire record in this case was made before the Board of Review, rather than be-

fore the Tax Court itself. The case of this petitioner is one of those which unfortunately was caught in the transitional period when the Board of Review was abolished and its functions and jurisdiction transferred to and vested in the Tax Court. Prior to the abolition of said Board, the member who heard the case had prepared Recommended Findings of Fact and Decision based upon the testimony and evidence adduced at the trial, lasting five days. The transcript of the testimony covered 759 pages, and in addition there were numerous exhibits. It is significant, we think, that the Memorandum Findings of Fact and Opinion of the Tax Court correspond almost verbatim with the Recommended Findings of Fact and Decision of the Board of Review. In fact the opinion of the Tax Court which comprises one paragraph is a mere restatement of the last finding made by the member of the Board of Review who presided at the hearing.

The Tax Court, with the present approval of the Circuit Court of Appeals, has adopted and pursued an entirely erroneous approach to the problem here presented in this litigation, in that said Tax Court has not only ignored the economic theories underlying the alleged shifting of the processing tax, but has wholly failed to make any findings of fact with respect to the economic factors bearing upon that question. It can no longer be disputed that the governing statute requires the taxpayer to prove that it had not shifted the burden of the tax in the economic rather than in the legal sense. It is this economic burden which, to date, has been ignored in the consideration of this case.

This very question of economic burden was considered by the United States Circuit Court of Appeals, Seventh Circuit, in *Cudahy Packing Co.* v. *U. S.*, 126 F. (2d) 429, from which the following is quoted (p. 431)

> "* * * it seems clear that the burden referred to was the economic burden, for otherwise the question of impossibility of proof could not have arisen."

* * * *

"Admittedly, the shifting of the burden in the legal sense is included in §902, but it does not follow therefrom that the burden, in its broader compass of the economic sense, was thereby to be eliminated."

* * * *

"Although the phrase 'economic burden' is not used in the section, any other interpretation of the word burden would do violence to the language and purpose of the section."

* * * *

"There is no doubt that the shifting of the burden in the economic sense requires more exhaustive and difficult proof than the legal test. The measure is not confined merely to acts of the taxpayer; it rests in the economic forces at play, forces over which the average individual has little, if any, control. One force, to be sure, may be the tax, but that makes no less real the other economic forces contributing to the resultant."

That the Seventh Circuit was wholly correct in its views in indicated beyond peradventure by Senate Report No. 2156 of the Committee on Finance, pp. 32-34, 74th Cong. 2nd Sess. from which the following is quoted:

"Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden."

* * * *

"The question as to whether processing taxes were passed on, however, involves extremely complicated economic and accounting considerations."

As the case at bar stands today, the decision which has been reached is based upon superficial surface indicia which are hereinafter adverted to, rather than upon economic considerations.

Even the Circuit Court of Appeals, as is apparent from its opinion (R. 280), is convinced that *all* the evidence ad-

duced from experts and other competent sources was not considered below by the presiding officer of the Processing Tax Board; at best, "most" of said evidence was so considered. But there is no showing whatsoever that said evidence, dealing with economic factors and with alleged shift of economic burden, was considered by the Tax Court, which body, rather than the Processing Tax Board, actually decided the issue below. And in the absence of such a showing, the Court says it "must be presumed" (R. 280) that the Tax Court also considered said evidence or such portion thereof as was considered by its predecessor in the case, the Processing Tax Board. We submit, however, that there is no reasonable basis for such a presumption. Rather the reverse is true.

Undoubtedly, the extent to which evidence was considered, is to be determined by the Findings of Fact, and no findings were made below by either the Tax Court or Processing Tax Board with respect to the economic factors or the alleged shift in economic burden, as testified to by two government economists and by another well versed in his field. That economic factors are properly to be considered for the purpose of showing what a taxpayer's margin would have been in the absence of a processing tax, other factors remaining the same, has been decided by the Circuit Court of Appeals, Fourth Circuit, in *Arkwright Mills* v. *Commissioner*, 127 F. (2d) 465.

The conclusion of the Tax Court is a conclusion made upon facts not found. An indispensable requirement in the procedure of all administrative bodies such as the Tax Court is that its decision must be based upon its findings and that its findings must be based upon the evidence. This requirement is stated by the Supreme Court in the following language, *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 357:

> "The Board which makes its findings and renders its decision *must* consider the evidence and base its findings and decision upon it, * * *". (Italics ours).

In failing and refusing to make adequate Findings of Fact, covering fully the economic factors and the opinions of skilled economists with respect to the incidence of the tax, the Tax Court is flying in the face of the quoted language of the United States Supreme Court. This alone is reversible error.

In an endeavor to show that the Tax Court considered the economic factors and the expert testimony in spite of its failure to make findings with respect thereto, respondent attached to its brief below as Appendix C (R. 256-271) a memorandum which had been prepared by Member Hathcock of the Processing Tax Board. Said memorandum was neither a finding nor an opinion and is not entitled to the dignity of either. It was obviously meant to perform the office of a brief in support of the recommended findings and decision of said member. It was dated July 31, 1942, whereas the Findings of Fact and Opinion of the Tax Court, which actually decided the case below, were dated August 27, 1943, more than twelve full months later. There is nothing in the record whatsoever to indicate that said memorandum of Member Hathcock was considered or even ever seen by Judge Van Fossan to whom this case was assigned by the Tax Court at the time when the Board of Review was abolished and its jurisdiction and functions transferred to the Tax Court of which Judge Van Fossan was a member.

As a matter of fact the criticisms of petitioner's position, as set forth in Member Hathcock's memorandum were directed at an earlier brief which had been filed by petitioner with the Board of Review. As a result of said criticisms petitioner was able, in filing its subsequent brief with the Tax Court, to eliminate alleged imperfections in its theory and its mathematical computations.

The factors here presented are not unlike those present in *Republic Cotton Mills* v. *Commissioner*, (CCA-4, January 31, 1945; 1945 Prentice Hall Federal Tax Service ¶72362) wherein the Circuit Court of Appeals in reversing the Tax Court had the following to say:

"The presiding officer of the Board filed recommended findings of fact in extenso and a recommended decision adverse to the claims without opinion or discussion; and the case was argued before the Board. But the Board was abolished before rendering a decision, and the case was then submitted to the Tax Court on the records and briefs. The court adopted, with slight modifications, the findings recommended by the presiding officer of the Board and filed a brief opinion wherein, without dicussion of its findings of fact or their bearing on the matter in dispute, it rejected the claim for refund in toto."

* * * *

"* * * but the court deemed it unnecessary to discuss these contentions or to determine the precise weight to be given to each of the factors advanced, and merely said that their aggregate weight was insufficient to convince them that the claimant bore the burden of any part of the processing tax which it had paid."

* * * *

"In so doing the court may not confine itself to a consideration of the prima facie effect of the statutory margins under § 907(a), for § 907(c) provides that the presumption established by subsection (a) may be rebutted by proof of the actual extent to which the claimant shifted the burden of the tax."

* * * *

"* * * all the evidence should be weighed and considered which is pertinent to the contention that the claimant bore the burden of a part of the tax which it paid."

The case should be remanded for adequate findings and for consideration of the foregoing factors.

B.

Margin computations in this case, considered alone, give rise to a presumption adverse to the taxpayer. This has been consistently admitted by the taxpayer from the very beginning; but the proof introduced by petitioner made that presumption inoperative. *Webre Steib Company,*

Ltd. v. *Commissioner*, — U. S. — (2-12-45; 13 LW 4199). In turn, this made it necessary for the Court below to weigh all the evidence generally relevant on the issue of whether the tax burden was shifted. There being no findings as to said other evidence of economic burden, it is obvious that there has in fact been no weighing of all the evidence.

Upon elimination of the aforseaid presumption, there were left in the case certain factors such as (R. 280) a greater net income for 1935, rubber stamp impressions regarding the shifting or absorption of the tax, an increase in sales price, and treatment of the tax as an item of cost, all of which factors when properly considered are not sufficiently substantial to support an ultimate finding wholly adverse to the taxpayer.

As to net income for 1935, this is of little or no assistance to the government or to the taxpayer in deciding the question of shift, for the reason, among others, that the tax here in controversy covers two months in 1934 and four months in 1935, whereas the income tax returns for Franklin Peanut Company reflect income for whole calendar years. There is no way of telling from the record in what part of the year the income was made or lost, or whether said income was derived from processing or from speculation. While, as stated by the Circuit Court of Appeals (R. 276) the highest net income for any year prior to 1935 back to 1919, "reported" by the taxpayer was $55,582.08, the highest net income of the taxpayer, as finally determined, for any one year during that period was $81,477.60. The increase in 1935 over the figure last stated is certainly attributable in large measure to the increased efficiency of the taxpayer's new plant. Furthermore, the average annual income of petitioner for the decade 1919-1928 was $45,095.12, whereas the corresponding figure for the decade 1929-1938, which includes the tax period, was only $40,380.50 (R. 203). Surely this lesser income in the tax decade proves that petitioner did not shift the tax but bore the economic burden thereof.

As to stamp impressions, it is well settled that whether a tax burden is absorbed or shifted must be judged by what happened, not by what was hoped for. As said in *Arkwright Mills* v. *U. S.*, 49 F. Supp. 970, affd. 139 F. (2d) 454 (CCA-4), "* * * what was meant or said or understood is not the test of whether a tax burden was shifted." In that case it was declared that the expression "price includes tax" does not mean that the economic burden was shifted to others. It is significant that the prices charged by petitioner were no different whether stamp impressions were or were not used. The test is the economic difference between what a seller would have realized if there had been no tax, and what he did realize after becoming liable for the tax.

As to increases in sales price, the Tax Court found that on the effective date of the processing tax, petitioner increased its prices by an amount "substantially equal" (R. 250) to the processing tax of one cent per pound. It was developed on cross examination that the increase amounted to only ¾ths of a cent per pound (R. 219-220). Certainly ¼th of the principal amount of tax here in dispute is substantial, and the testimony relied on by respondent does not support the finding made by the Court. Since the taxpayer incurred and paid no processing taxes until November 1, 1934, and since its price increase, whatever its amount, was made October 1, 1934, it is certain, it seems to us, that said increase could not possibly have included *any* tax.

As to treatment of the processing tax as expense, the retort is—how could Franklin Peanut Company have treated it otherwise since it paid the tax? The question as to whether a disbursement made in this manner can properly be looked upon as shifted to others, is a question to be answered by economists. The latter were asked regarding this and they made definite responses as the record definitely indicates. Failure of the Tax Court to make specific findings with respect thereto, is reversible error.

It should also be noted that at no time did petitioner bill the tax separately and that, in contrast to the practice of

its competitors, the taxpayer never agreed to refund any portion of the tax to its vendees. The Tax Court's Findings do not cover these factors. That Court did find that brokers reduced their commissions charged petitioner in order "* * * to help petitioner bear the processing tax * * *" (R. 250). Obviously, this finding which was noted, but without comment, by the Circuit Court of Appeals (R. 277) is wholly at variance with the ultimate finding that petitioner did not bear any part of the processing tax.

C.

The Court below placed strong reliance upon *Dobson* v. *Commissioner*, 320 U. S. 489 (R. 278). But the situation in the *Dobson* case and in that at bar are entirely different, and the reasons for the decision in the former are absent in the latter. In *Dobson*, there were adequate and complete Findings, the ultimate conclusion being obviously based upon consideration of all the evidence. The reverse is true here. The *Dobson* case was decided by an "administrative body having special competence to deal with the subject matter," (p. 502) whereas the Findings in petitioner's case were drafted by an employee of the Treasury Department, a member of a Board later abolished.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is submitted that a writ of certiorari should issue.

Respectfully submitted,

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